

IN RE PERUSAHAAN JENWATT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[COMPANIES WINDING-UP NO. D3-42-86-88]
30 NOVEMBER 1989

COMPANY LAW: Notice of demand - Requirements of - Section 218(2)(a) of the Companies Act 1965 - Debt to be specified - Amount stated in demand in excess of the debt due - Whether notice bad in law - Non-compliance with such notice - Whether company deemed unable to pay its debts - Section 223(a) of the Companies Act.

This is an application seeking the order of the Court that the winding-up petition filed by the petitioning creditor be set aside.

In the petition, the petitioning creditor stated that the company was indebted to them. Following this, the petitioning creditor avers that a notice of demand was served on the company and that no monies were forthcoming to them.

It is the petitioning creditor's contention that the company is unable to pay its debt and in the circumstances it is just and equitable that the company be wound up.

The company in turn disputed the sum claimed, as the amount stated in the demand and in the petition differed. According to the company, the said notice was invalid.

The question that arose here was whether the company failed to comply with the requirements of the notice, and if there was non-compliance, whether the company was deemed unable to pay its debts.

Held:

[1] Section 218(2)(a) of our Act should be given a literal interpretation. The notice of demand must comply strictly with the requirements of s. 218(2)(a) of the Companies Act 1965.

[2] Section 223(a) of the Companies Act contemplates a creditor being able to point to a debt of a specified sum that cannot be seriously questioned either as to existence or quantum. In this case the petitioner knew that the company was disputing liability in that sum therefore the petitioner was in no position to make a genuine demand for a specified sum.

[3] In the present case, the notice of demand had not strictly complied with the requirements of s. 218(a) of the Companies Act 1965.

[4] As the amount stated in the notice of demand was far in excess of the debt due, the notice is bad.

[5] The failure on the part of the company to pay the sum claimed does not mean that the company is unable to pay its debt and therefore the winding-up petition is set aside.

[Application allowed.]

a Cases referred to:

Processed Sand Pty. Ltd. v. Thiess Contractors Pty. Ltd; Breen Holdings Pty. Ltd. v. Thiess Contractors Pty. Ltd. [1983] 1 ACLC 1069
Deputy Commissioner of Taxation v. Cye International Pty. Ltd. [1986] 10 ACLR 305
Re A Company [1984] 1 WLR 1090

Legislation referred to:

- b** Companies Act 1981 (NSW)[Aust], s. 364(2)
Companies Act 1965, ss. 218(2)(a)

For the respondent - M. Pathmanathan; M/s. Yusuf Lee Pathma & Marbeck
For the government - Mustaffa bin Ibrahim
For the official receiver - Lee Ee Kwang

JUDGMENT

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Zakaria Yatim J:

- d** This is an application by a company, Perusahaan Jenwatt Sdn. Bhd. (hereinafter referred to as the company) seeking the order of the Court that the winding-up petition filed by the petitioning creditor on 15 February 1988 be set aside. The company also asks that the costs of and incidental to these proceedings be paid by the petitioning creditor in any event.

- e** In the affidavit in support of the application, the managing director of the company averred, *inter alia* that in para. 6 of the petition, the petitioning creditor stated that the indebtedness of the company was in the sum of RM29,548.46. He then referred to the notice of demand, dated 16 June 1987 sent by the petitioning creditor under s. 218 of the Companies Act 1965. In the notice a demand was made by the petitioning creditor for a sum of RM295,584.46. According to the deponent, the notice was invalid as the company did not owe the petitioning creditor the amount stated in the notice.

- f** I shall now examine the petition itself. In para. 5 of the petition it is stated that the company was indebted to the petitioning creditor in the sum of RM29,584.46. In para. 6 of the petition the petitioning creditor states that it has made application to the company for the payment of its debt by serving a notice of demand dated 16 June 1987 pursuant to s. 218(2)(a) of the Companies Act by leaving a copy of the said notice at the registered office of the company. According to the petitioning creditor, no payment had been received after service of the said notice. A copy of the said notice is annexed to the petition and marked DTCL. The said notice is reproduced below:

- g** Jabatan Hasil Dalam Negeri,
Cawangan Pungutan,
(Tingkat 7-12),
Blok 11, Komplek Bangunan Kerajaan,
Jalan Duta,
50600 Kuala Lumpur.

- h** Telefon: K.L.2540066 & 2547055.
Ruj. Kami: X/C 884026 - 01 dlm. PJA.

- i** Saya, Teo Tee Cheam Penolong Pengarah Kanan, Hasil Dalam Negeri, Komplek Bangunan Kerajaan, Jalan Duta, 50600 Kuala Lumpur, dengan ini menuntut bayaran sepertimana yang diperuntukkan dalam s. 218(2)(a) Akta Syarikat 1965, dalam tempoh TIGA (3) minggu dari tarikh penyerahan Notice Tuntutan ini bagi jumlah dalam Hukuman Guaman Sibil No. P859/1985.

Jumlah Tuntutan dalam Hukuman \$295,584.46

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Bertarikh 16 June 1987.

t.t.

(Teo Tee Cheam)

Penolong Pengarah Kanan, Hasil Dalam Negeri,
Kompleks Bangunan Kerajaan, Jalan Duta,
50600 Kuala Lumpur.

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Kepada:

Perusahaan Jenwatt Sdn. Bhd.

MY Business Consultants Sdn. Bhd.,

33B, 2nd Floor, (Front), Wisma CL Yap,

Jalan Tengku Kelana, Kelang.

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Paragraph 7 of the petition states that the company is unable to pay its debt and in the circumstances it is just and equitable that the company be wound-up.

It is clear that the notice of demand relied upon by the petitioning creditor in the petition is the notice reproduced above and as pointed by Mr. Pathmanathan, Counsel for the company, the amount stated in the notice far exceeded the amount stated in the petition.

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It appears that the petitioning creditor filed the petition on the basis of a judgment debt. The judgment which was obtained in default of appearance was in the sum of RM25,987.50 plus interest at the rate of 8% per annum from the date of judgment to the date of realization and costs of RM225.

The petitioning creditor in its affidavit affirmed on 23 May 1988 averred that the correct amount claimed by the petitioning creditor based on the judgment debt was RM29,584.64 and not RM295,584.46 as claimed by the company. According to the petitioning creditor the original notice was served on the company on 16 June 1987. Exhibited to the said affidavit is a copy of the notice stating the amount of RM29,584.46. According to the deponent the original notice was sent to the company.

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In considering the present application the Court has to consider the petition and the notice annexed to it. It is clear that the amount stated in the notice far exceeds the amount due as stated in para. 5 of the petition. The question that arises here is whether the company which failed to comply with the requirements of the notice, is deemed to be unable to pay its debts. The Australian decisions appear to be conflicting on this point.

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In the *Processed Sand Pty. Ltd. v. Thiess Contractors Pty. Ltd.*; *Breen Holdings Pty. Ltd. v. Thiess Contractors Pty. Ltd.* [1983] 1 ACLC 1096, the Supreme Court of New South Wales decided that a notice of demand which claimed more than the amount actually due would not come within s. 364(2) of the Companies Act 1981 and non-compliance with it would not give rise to any deemed inability on the part of the company to pay its debts. Section 364(2) of the Companies Act is identical with our s. 218(2)(a). Similarly, in *Deputy Commissioner of Taxation v. Cye International Pty. Ltd.* (No. 2) [1986] 10 ACLR 305, the Supreme Court of New South Wales, decided that a demand for an additional sum over and above the amount which was due at the date of the demand vitiated it as a proper demand under s. 364 of the Companies (NSW) Code. The case of *Processed Sand Pty. Ltd. supra* was followed in that case.

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The Supreme Court of Victoria on the other hand expressed a different view in *Re Fabo Pty Ltd.* In that case the Deputy Commissioner of Taxation sought to wind up Fabo Pty. Ltd. on the grounds that it was unable to pay its debts. The Commissioner relied upon the failure of

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- a* the company to comply with the notice served upon it pursuant to s. 364(2)(a) of the Companies Code. Although the company had not responded to the notice, the Master found that the Commissioner was seeking to rely upon a notice which overstated the debt owed to it by the company. The matter was referred to the full court for consideration. It was held that Fabo Pty. Ltd. be wound-up. The Court also held that overstatement *per se* was insufficient to invalidate the notice. The Court was of the view that in construing s. 364(2)(a), it should not adopt a literal interpretation. The Court said:
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A literal interpretation would compel the Court not to make a winding-up order notwithstanding the existence of clear evidence that an undisputed debt exceeding RM1,000 has remained unpaid after the making of a proven demand without any reasonable explanation being advanced for this failure to do so... By contrast the wider interpretation avoids such unfortunate consequences, is consistent with the legislative scheme underlying the provisions and permits the Court to make a winding-up order where it is appropriate to do so.

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With respect, I am inclined to follow the decisions in *Processed Pty. Ltd. v. Sand Pty. Ltd. v. Thiess Contractors Pty. Ltd.* [1983] 1 ACLC 1069, *supra*, and *Deputy Commissioner of Taxation v. Cye International Pty. Ltd.* [1986] 10 ACLR 305, *supra*, for the following reasons;

- d* Firstly, in *Processed Sand Pty. Ltd. supra*, s. 364(2) of the Australian Companies Act was given a literal interpretation. Waddell J in his judgment in that case said:

...But there are, in my opinion, much stronger considerations which indicate that the provision should be given a literal interpretation. Its effect is to provide a statutory admission that a company is unable to pay its debts. One would except such an admission to be created only if the amount claimed by the notice of demand and not paid or secured or compounded for to the reasonable satisfaction of the creditor was an amount either admittedly due or one as to which there was no real dispute as to liability. It would seem arbitrary and unjust to create an admission arising on failure to pay...a debt, a part of which was not due.

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- I agree with the passage quoted above. In my view s. 218(2)(a) of our Act should be given a literal interpretation. This view is consistent with what I have earlier in another case *viz.* that the notice of demand must comply strictly with the requirements of s. 218(2)(a). See *In the matter of Yap Kim Kee, Companies Winding-up* No. D4-42-242 of 1988. (unreported).
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Secondly *Processed Sand Pty. Ltd. v. Cye International Pty. Ltd. supra*; and *Deputy Commissioner of Taxation v. Cye International Pty. Ltd.* [1986] 10 ACLR 305, *supra*, appear to be consistent with decision of the Court in England in *Re A Company* [1984] 1 WLR 1090. In that case, Mervyn Davies J in his judgment at p. 1095 said:

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When the demand was made, the amount due to the petitioner was not known to the company... At the time of the demand the company knew there was a dispute and were willing to pay 2,234.38 pounds but that is not to say that they knew that the sum due was 2,234.38 pounds. They knew that the petitioner was alleging the sum due to be 12,435.75 pounds. As to the petitioner, it knew that the company were disputing liability in that sum. In these circumstances I do not see how the petitioner was in any position to make a genuine demand for a specified sum. **Section 223(a) contemplates a creditor being able to point to a debt of a specified sum that cannot be seriously questioned either as to existence or quantum.** It follows that the petitioner was not at liberty to make use of s. 223(a)... I am satisfied that the statutory demand ought not to have been served... (Emphasis added).

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In the present case, the notice of demand has not complied strictly with the requirements of s. 218(2)(a). Since the amount stated in the said notice is far in excess of the debt due, failure on the part of the company to pay the sum claimed does not mean that the company is unable to pay its debt under the section. The notice of demand is therefore bad and the Court cannot presume that the company is unable to pay its debts.

In the circumstances I set aside the petition filed on 15 February 1988 with costs to the company in any event. The petitioning creditor is at liberty to file a fresh petition.

Also found at [1990] 1 CLJ 491

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